STATE OF MICHIGAN

COURT OF APPEALS

SBC MICHIGAN,

Appellant/Cross-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

MICHIGAN PAY TELEPHONE ASSOCIATION,

Appellee/Cross-Appellant.

UNPUBLISHED
September 28, 2006

No. 254980
MPSC
LC No. 00-011756

MICHIGAN PAY TELEPHONE ASSOCIATION,

Appellant/Cross-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION and SBC MICHIGAN, d/b/a AMERITECH MICHIGAN, f/k/a MICHIGAN BELL TELEPHONE COMPANY,

Appellees,

and

VERIZON NORTH, INC., f/k/a GTE NORTH, INC.,

Appellee/Cross-Appellant.

No. 261341
MPSC
LC No. 00-011756

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In Docket No. 254980, SBC Michigan (SBC) appeals and the Michigan Pay Telephone Association (MPTA) cross-appeals an order on remand entered on March 16, 2004 by the Michigan Public Service Commission (PSC) granting in part and dismissing in part the MPTA's complaint. In Docket No. 261341, the MPTA appeals[1] from the March 16, 2004, order and the PSC's February 10, 2005, order denying rehearing, and Verizon North, Inc., f/k/a GTE North, Inc. (Verizon), cross-appeals from the March 16, 2004, order. These cases have been consolidated for purposes of hearing and decision. We affirm in each case.

I. Underlying Facts and Proceedings

As a general rule, payphone service in Michigan is provided by local exchange carriers (LECs), such as SBC and Verizon, and independent payphone providers (IPPs). An IPP is an organization that operates any number of payphones.[2]

In 1984, the Federal Communications Commission (FCC) issued an order requiring LECs to offer payphone access services to IPPs. At that time, the payphones, known as "dumb sets," owned by LECs were operated by central office equipment, and were connected to the network through a line known as a coin line. In order to utilize this type of line, IPPs were required to purchase payphones known as "smart sets." These units function as a computer and have the ability to perform tasks such as answer detection, error messaging, etc., at the phone itself. Payphones owned by IPPs are connected to LECs' networks by customer owned coin operated telephone (COCOT) access lines.

In 1996, Congress enacted the Federal Telecommunications Act (FTA) of 1996, 47 USC 151 *et seq*., which included provisions designed to enhance local competition. Section 276 of the FTA, 47 USC 276, prohibited LECs from subsidizing their own payphone service and from discriminating in favor of their service and against service offered by IPPs. 47 USC 276 provides in pertinent part:

> **(a) Nondiscrimination safeguards**
>
> After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service—
>
> **(1)** shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and
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> **(2)** shall not prefer or discriminate in favor of its payphone service.
>
> **(b) Regulations**

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[1] The MPTA raises the same issues as both appellant and cross-appellant.

[2] The MPTA is a trade organization comprised of IPPs.

(1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that-

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access payphone service elements and payments in effect on such date of enactment,[3] and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry—III (CC Docket No. 90-623) proceeding;[4]

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry inter-LATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

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[3] This subsection has been amended, and the phrase "on such date of enactment" has been replaced with the phrase "February 8, 1996."

[4] See *In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards,* CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571 (December 20, 1991) (*Computer III*).

* * * *

(c) State preemption

> To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

In the *First Payphone Order*,[5] the FCC held that to implement the nonstructural safeguards requirement of 47 USC 276(b)(1)(C), LECs were obliged to comply with the nonstructural safeguards in the *Computer III* order. LECs were required to unbundle payphone line services and file tariffs for those services using the New Services Test (NST), a forward-looking, cost-based test that establishes the direct cost of providing a new service as a price floor, and then adds a reasonable amount of overhead to compute the overall price of the new service.

The MPTA requested that the PSC initiate an investigation to determine whether the tariffs filed by Ameritech, now SBC, and GTE, now Verizon, complied with the FTA and the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq*. The PSC declined to initiate a contested case, but ordered Ameritech/SBC and GTE/Verizon to provide the MPTA with access to cost studies approved in PSC Case Nos. U-11280 and U-11281.

Thereafter, the MPTA filed a complaint against Ameritech/SBC and GTE/Verizon alleging that: (1) the prices for network services charged by Ameritech/SBC and GTE/Verizon were not consistent with the NST; (2) the services provided by Ameritech/SBC and GTE/Verizon were discriminatory; and (3) Ameritech/SBC and GTE/Verizon subsidized their payphone operations with revenue from noncompetitive services.

In an order entered on March 8, 1999, the PSC found that the MPTA failed to meet its burden of showing that Ameritech's/SBC's and GTE's/Verizon's payphone service rates did not comply with the NST. The PSC found that IPPs should be charged as business customers and not wholesale customers, and that the comparison of an IPP line to a business line was appropriate under the circumstances. The PSC also rejected the MPTA's assertion that the end-user common line (EUCL) charge should be deducted when calculating rates under the NST.

In *MPTA v Public Service Comm*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2001 (Docket No. 219950), another panel of this Court affirmed the PSC's decision. The MPTA sought leave to appeal this Court's decision to our Supreme Court, and filed a petition with the FCC seeking a declaratory ruling that the PSC's March 8, 1999, order was not consistent with the NST.

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[5] See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (September 20, 1996). The *First Payphone Order* and subsequent orders are known collectively as the *Payphone Orders*.

While those proceedings were pending, the FCC issued its *Wisconsin Order*.[6] In that order, the FCC noted that Congress enacted 47 USC 276 to promote competition between Bell Operating Companies (BOCs) and IPPs, and that 47 USC 276 required BOCs to set intrastate payphone line rates in compliance with the NST. The FCC asserted that its order would "assist states in applying the new services test to BOCs' intrastate payphone line rates in order to ensure compliance with the *Payphone Orders* and Congress' directives in section 276." *Wisconsin Order*, ¶ 2.

In the *Wisconsin Order*, the FCC concluded that: pursuant to 47 USC 276, it had jurisdiction over the intrastate payphone rates charged by BOCs, but not those charged by non-BOC LECs, *id*. at ¶ ¶ 31-42; the use of a forward-looking pricing methodology, such as total element long-run incremental cost (TELRIC) or total service long-run incremental cost (TSLRIC) was acceptable when applying the NST, *id*. at ¶ ¶ 43-50; states could continue to use UNE loading factors to evaluate a BOC's overhead allocation for payphone services, *id*. at ¶ ¶ 51-58; under the NST, a BOC cannot charge more for payphone line service than is necessary to recover "all monthly recurring direct and overhead costs incurred" in providing payphone lines, *id*. at ¶ 60, and when establishing a cost-based state-tariffed charge for payphone line service, a BOC must reduce its line charge by the amount of the federally tariffed charge, *id*. at ¶ 61; and that the NST applies to usage sensitive as well as to flat-rate elements of services offered to IPPs, i.e., "all payphone service line rates, including per-call or per-minute rates applicable to local usage." *Id*. at ¶ 63.

Following the issuance of the *Wisconsin Order*, the FCC instructed the PSC to "re-evaluate" its decision "concerning the pricing of BOCs' intrastate payphone line rates and overhead ratios to ensure compliance with the *Wisconsin Order*." Our Supreme Court vacated this Court's previous decision and remanded the matter to the PSC for reconsideration in light of the *Wisconsin Order*. *MPTA v Public Service Comm*, 466 Mich 883; 646 NW2d 471 (2002).

On March 16, 2004, the PSC issued an order on remand granting in part and dismissing in part the MPTA's complaint. The PSC rejected SBC's and Verizon's argument that the *Wisconsin Order* substantially changed the NST by establishing that payphone rates, including overhead allocations, be established on the basis of forward-looking costs, such as TELRIC pricing, by requiring that the subscriber line charge (SLC) be removed from payphone rates, by stating that local usage was subject to the NST, and by allowing the inclusion of certain retail costs in calculating direct costs. The PSC observed that the FCC had used forward-looking cost methodologies, such as TELRIC or TSLRIC, when applying the NST, and approved the use, at the state's discretion, of either the methodology explained in the *Physical Collocation Order*[7] or

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[6] *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, CCB/CPD No. 00-01, *Mem Op and Order*, FCC 02-25 (released January 31, 2002).

[7] *In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 930162, Second Report and Order, FCC 97-208, 12 FCC Rcd 18730 (1997).

the *Open Network Architecture* (ONA) *Order*.[8] In addition, the PSC noted that the FCC relied on its prior orders and precedent when holding that payphone rates must be reduced by the SLC, and that usage charges were subject to the NST. Moreover, the PSC observed that the FCC noted that inclusion of certain retail costs in direct costs had never been precluded.

In its order, the PSC also: reaffirmed the holding in its March 9, 1999, order that required Verizon's payphone rates to be subjected to the NST; found that, with the exception of the EULC, SBC and Verizon demonstrated that their IPP rates complied with the NST, and that it was authorized to compare business line rates with IPP rates as one factor in determining whether the companies' IPP rates complied with the NST; rejected the MPTA's argument that the LECs should be required to use the UNE method for determining whether their IPP rates complied with the NST, noting that the FCC stated in the *Wisconsin Order* that LECs had three options for use in reaching that determination; rejected the MPTA's assertion that SBC's analysis of its IPP rates relied on cost studies that had been rejected in previous proceedings, and that SBC understated its cost to provide payphone service because the costs on which SBC relied did not match those filed pursuant to the 1999 order; found that SBC was required to account for the intrastate EULC, a non-cost-based charge, in determining whether its IPP rates comply with the NST, and that with this adjustment, SBC's IPP rates complied with the NST; rejected the MPTA's assertion that Verizon's proposed overhead allocation methodology was inconsistent with the ONA/ARMIS[9] cost methodology for determining whether its IPP rates complied with the NST, but that Verizon erroneously ignored the end user subscriber line charge (EUSLC) in analyzing its coin line rates, and that with that correction, Verizon's IPP rates would comply with the NST; and that to the extent that SBC and Verizon had charged IPP rates in excess of the ceiling established by the NST, the companies' rates were unlawful, and their customers were entitled to refunds but not attorney fees.

In an order entered on February 10, 2005, the PSC denied the MPTA's petition for rehearing. The PSC held, inter alia, that to the extent that SBC and Verizon were required to issue refunds, only those 62 members of the MPTA named in the MPTA's complaint were entitled to receive refunds.

II. Standard of Review

The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC

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[8] *In the Matter of Open Network Architecture Tariffs of Bell Operating Companies*, CC Docket No. 92-91, FCC Order 93-532, 9 FCC Rcd 440 (1993).

[9] ARMIS stands for Automated Reporting Management Information System, which is a federally mandated reporting system.

order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney Gen v Public Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

We give due deference to the PSC's administrative expertise, and will not substitute our judgment for that of the PSC. *Attorney Gen v Public Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). We give great weight to any reasonable construction of a regulatory scheme that the PSC is empowered to administer, *Champion's Auto Ferry, Inc v Public Service Comm*, 231 Mich App 699, 708; 588 NW2d 153 (1998), but we may not abandon our responsibility to interpret statutory language and legislative intent. *Miller Bros v Public Service Comm*, 180 Mich App 227, 232; 446 NW2d 640 (1989). Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. Analysis

A. Application of the NST to Usage Sensitive Services

The MPTA argues that the PSC failed to properly apply the NST to the usage sensitive service rates charged by SBC and Verizon.[10] Neither SBC nor Verizon provided any evidence to support their usage sensitive services in their May 1997 compliance filings; therefore, the MPTA concludes, the PSC could not find that the usage sensitive service rates charged by SBC or Verizon complied with the NST. See MCL 24.285; *Attorney Gen v Public Service Comm*, 206 Mich App 290, 295; 520 NW2d 636 (1994).

The MPTA also asserts that the PSC erred in finding that it was authorized to compare overhead allocation rates charged by LECs for business lines with overhead allocation rates charged for payphone lines to determine if the payphone line rates complied with the NST. The FCC rejected reliance on business line rates as a comparison to support payphone line rates. *Wisconsin Order*, ¶ 55. The PSC cannot impose a state requirement that is inconsistent with the FCC's regulations. 47 USC 276(c).

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[10] An IPP pays an LEC such as SBC or Verizon a flat monthly fee for the use of a payphone line itself, plus an amount for each call made from the payphone. This amount is known as the "usage sensitive service" rate element. The NST requires an LEC to price network services at the direct cost of the service, plus a reasonable overhead allocation. An LEC is not entitled to recover "more than a reasonable portion" of its overhead costs. See 47 CFR § 61.49(g)(2).

We disagree. The NST is a forward-looking, cost-based test that establishes the direct cost of providing a new service as a price floor, and then adds a reasonable amount of overhead to compute the overall price of the new service. The NST is, by its nature, flexible, and does not require the use of a single method by which to calculate the cost of a service. *Wisconsin Order*, ¶ 58. On remand, the PSC was charged with reevaluating its earlier decision to ensure that the intrastate payphone line rates charged by SBC and Verizon complied with the NST and the *Wisconsin Order*. The PSC concluded that, with minor exceptions, the rates charged by SBC and Verizon adhered to the NST.

The PSC correctly found that, with the exception of the failure to account for the EUCL charge, SBC's IPP rates complied with the NST. The PSC properly relied on the FCC's statement that the NST is flexible to reject the MPTA's assertion that SBC should be required to use the UNE methodology to calculate overhead allocations when establishing rates for IPP services. Furthermore, the PSC's finding the SBC's application of the NST to its usage sensitive services was appropriate was supported by the requisite evidence, and we defer to its administrative expertise. *Public Service Comm No 2, supra* at 88.

Moreover, the PSC did not err by comparing SBC's IPP rates to SBC's business line rates. The FCC did not preclude such a comparison in the *Wisconsin Order*, but rather stated that such a comparison could not serve as the sole basis for approving IPP line rates pursuant to the NST. The PSC did not rely on this comparison as its sole basis for approving SBC's IPP rates, but instead used the comparison as merely one factor in its analysis. The removal of business line rates from regulation by 2005 PA 235 does not affect the validity of the PSC's comparison because the comparison was not based on the fact of regulation.

Similarly, the PSC correctly found that Verizon applied the NST to its usage sensitive rates in an appropriate manner, with the exception of Verizon's failure to take into account the EUSLC in analyzing the coin line rate. Verizon used the ONA/ARMIS method of demonstrating compliance with the NST, as permitted by the *Wisconsin Order*. Verizon's calculation of the direct costs associated with a COCOT line included usage. The PSC's acceptance of this method of calculation on the basis that usage cannot be purchased on a stand-alone basis, and must be analyzed along with access, was reasonable and is entitled to deference. *Champion's Auto Ferry, supra*.

Finally, we reject the MPTA's argument that Verizon improperly relied on TSLRIC figures that did not match those approved in previous cases. The approved figures were not available in May 1997 when Verizon submitted its compliance filings in this matter.

B. Adoption of Verizon's Direct Costs

The MPTA argues that the PSC's order as it pertains to Verizon is unlawful and unreasonable because the order relies on: (1) a cost study for its coin line service submitted by Verizon after the study had been rejected in an arbitration proceeding between AT & T and then-

GTE; and (2) a cost study for its COCOT line service that was rejected in PSC Case No. U-11281.[11]

Moreover, the MPTA contends that Verizon improperly relied on cost studies that used different assumptions for coin line service and COCOT line service, thereby resulting in significantly different costs for the services. The PSC's acceptance of Verizon's studies in this proceeding was arbitrary and capricious. We disagree.

The MPTA's assertion that the PSC should have required Verizon to rely on modified studies approved in another case is groundless in light of the fact that those studies did not exist when Verizon made its compliance filing in May 1997 in this case. Given the lack of evidence to show that Verizon's studies were unreasonable at the time they were conducted, we decline to second-guess the PSC's decision to rely on the studies. *Champion's Auto Ferry*, *supra*.

Verizon's use of different cost studies for its coin line service and its COCOT line service resulted in differences in the overhead allocations for the services, but does not, in and of itself, demonstrate that Verizon failed to comply with the NST. The NST allows a flexible approach to calculating costs. *Wisconsin Order*, ¶ 58. The PSC's decision to rely on cost studies not shown to have been invalid at the time they were conducted is entitled to deference. *Public Service Comm No 2*, *supra* at 88.

C. Uniform Application of the NST

The MPTA argues that the PSC erred by failing to order that the lower rates mandated by the FCC be applied to all IPPs, and not to only those IPPs named in the complaint. The MPTA asserts that the PSC's decision results in discriminatory rate setting in violation of 47 USC 276(a). We disagree.

The MPTA initiated this case by filing a complaint with the PSC. Under the PSC's rules of practice and procedure, a complaint may be filed by a party "having an interest in the subject matter of the complaint…." 1997 AACS, R 460.17501 (Rule 501). The PSC has consistently determined that an association like the MPTA cannot pursue a complaint in a representative capacity because it has not suffered an injury in fact. Furthermore, absent statutory authority, the PSC could not grant monetary relief to non-parties. *Bolt v Lansing (On Remand)*, 238 Mich App 37, 57-58; 605 NW2d 745 (1999). The PSC's order did not discriminate against IPPs not named in the MPTA's complaint.

D. Application of the NST to Verizon's Rates

Verizon, a non-BOC LEC,[12] argues that the PSC erred by holding that Verizon's payphone rates were subject to the NST. Verizon contends that this issue must be reexamined in

[11] In that case, the PSC ordered Verizon to resubmit modified cost studies, and then approved the modified studies.

[12] Verizon was formerly known as GTE North, Inc. Verizon indicates that it did not become a (continued…)

light of the *Wisconsin Order*, which held that the FCC lacked jurisdiction under 47 USC 276 to apply the NST to non-BOC LECs. *Wisconsin Order*, ¶ 42. Furthermore, Verizon claims that MCL 484.2318(2) does not give the PSC explicit authority to expand nonstructural safeguards to non-BOCs. We disagree.

The PSC possesses only that authority granted to it by the Legislature. Authority must be granted by clear and unmistakable language. *Attorney Gen v Public Service Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998).

MCL 484.2318 provides:

> (1) A provider of basic local exchange service shall not discriminate in favor of its or an affiliate's payphone service over similar services offered by another provider.
>
> (2) A provider of payphone service shall comply with all nonstructural safeguards adopted by the federal communications commission for payphone service.

We hold that the PSC did not err when it concluded that MCL 484.3218 authorized application of the NST to Verizon's payphone rates. Initially, we note that Verizon's assertion that MCL 484.2318 was repealed by 2005 PA 235, and thus no longer supports the PSC's position, is erroneous.[13]

Pursuant to 47 USC 276, the FCC is authorized to apply nonstructural safeguards to BOCs, but has no congressional grant of jurisdiction over non-BOC LEC line rates. *Wisconsin Order*, ¶ 14. However, a state commission, like the PSC, may choose to apply the provisions of the *Wisconsin Order* to non-BOC LECs pursuant to state law. *Id*. at ¶ 3 n 12.

MCL 484.2318(2) requires "[a] provider of payphone service" to "comply with all nonstructural safeguards adopted by the [FCC] for payphone service." The statute does not limit this requirement to BOCs. The PSC has the authority to administer the MTA, and to act in a manner consistent with federal rules and regulations. MCL 484.2201. The PSC's conclusion that MCL 484.2318 grants it the authority to apply nonstructural safeguards, such as the NST, to non-BOCs such as Verizon is reasonable in light of the plain language of MCL 484.2318(2), *Cherry Growers, Inc v Michigan Processing Apple Growers, Inc*, 240 Mich App 153, 166; 610 NW2d 613 (2000), and is entitled to deference. *Public Service Comm No 2, supra* at 88.

(…continued)

BOC by virtue of GTE's merger with Bell Atlantic Corporation. The term "Bell operating company" does not include an "affiliate of any such company." 47 USC 153.

[13] MCL 484.2604 provides that the MTA is repealed effective December 31, 2009, and not December 31, 2005.

E. Retroactive Application of the NST and Refunds

SBC argues that the PSC erred by holding that the *Wisconsin Order* should be given retroactive effect, and that the IPPs named in the complaint were entitled to refunds back to April 15, 1997, the date by which the FCC required BOCs to comply with the NST. The *Wisconsin Order's* requirement that, "in establishing its cost-based, state tariffed charge for payphone line service, a BOC must reduce the monthly per line charge determined under the new services test by the amount of the federally tariffed SLC," *id*. at ¶ 61, marked a substantive change in the formulation of the NST. The FCC knew or should have known that BOCs had relied on its earlier pronouncements regarding the formulation of the NST; nevertheless, the FCC did not direct that the restructured NST be applied retroactively and that refunds be issued back to April 15, 1997. Furthermore, the PSC's order violates the prohibition against retroactive ratemaking and the filed rate doctrine. We disagree.

An FCC decision that clarifies a confusing or an unsettled area of the law does not change the law. *MCI Telecom, Inc v Michigan Bell Tel Co*, 79 F Supp 2d 768, 801 (ED Mich, 1999). In the *Wisconsin Order*, the FCC clearly stated that it was relying on the 1996 *Payphone Orders* as the bases for its explanation of the NST. *Wisconsin Order*, ¶ 1. In the *First Payphone Order*, the FCC stated that in order to comply with 47 USC 276 and the *Computer III* order, LECs were required to unbundled payphone line services and file tariffs for those services pursuant to the NST. The FCC characterized the *Wisconsin Order* as one designed to "assist" states in the application of the NST to ensure compliance with the *Payphone Orders* and 47 USC 276, *Wisconsin Order*, ¶ 2, and rejected an assertion that the *Wisconsin Order* changed the law.[14] Therefore, we find that the PSC's conclusion that the *Wisconsin Order* clarified but did not change the law, and thus could be applied retroactively, was reasonable. *Champion's Auto Ferry*, *supra*.

Retroactive ratemaking in utility cases is prohibited. *Detroit Edison Co v Public Service Comm*, 416 Mich 510, 523; 331 NW2d 159 (1982). Utility rates are set on the basis of estimates of costs. When the estimates prove inadequate, the previously set rates cannot be changed to correct the error. *Michigan Bell Tel Co v Public Service Comm*, 315 Mich 533, 544-547; 24 NW2d 200 (1946). The only step the PSC can take is to prospectively revise rates in order to better estimate costs. *Detroit Edison Co*, *supra*. The bar against retroactive ratemaking applies only to rates charged by a utility under a lawful order. The PSC can mandate a refund of monies paid pursuant to rates set under an unlawful order. *In re MCI Telecom Complaint*, 255 Mich App 361, 366; 661 NW2d 611 (2003).

Under the filed rate doctrine, a public utility "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission." *Montana-Dakota Utilities Co v Northwestern Public Service Co*, 341 US 246, 251; 71 S Ct 692; 95 L Ed 2d 912 (1951); see also *Detroit Edison Co*, *supra* at 516. However, if a tariff rate is found to be unlawful, the filed rate doctrine is inapplicable, and a refund can be ordered. *In re MCI*, *supra*.

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[14] See *In the Matter of Request to Update Default Compensation Rates for Dial Around Calls from Payphones*, 19 FCC Rcd 15636, ¶ 60 (released August 12, 2004).

The PSC did not violate the prohibition against retroactive ratemaking by ordering SBC and Verizon to refund monies to IPPs back to April 15, 1997. In its March 8, 1999, order, the PSC approved the rates proposed by SBC and Verizon for IPP services. However, following the issuance of the *Wisconsin Order*, our Supreme Court vacated this Court's 2001 decision that affirmed the PSC's 1999 order, and remanded the matter to the PSC for reconsideration in light of the *Wisconsin Order*. On remand, the PSC concluded that, with the exception of the failure to account for the EUCL charge and the EUSLC, the rates charged by SBC and Verizon for IPP services complied with the NST.

The PSC concluded that to the extent that SBC and Verizon had charged rates for IPP services that exceeded the ceiling established by the NST, those rates were unlawful, and the IPPs were entitled to refunds. The PSC did not change rates to account for shortfalls resulting from a failure to properly estimate costs; thus, its order did not violate the prohibition against retroactive ratemaking. *In re MCI*, *supra*.

Similarly, the filed rate doctrine was inapplicable under the circumstances. *Id*. The FCC required LECs to adjust their rates charged to IPPs to comply with the NST. This obligation is a nonstructural safeguard, *First Payphone Order*, ¶ 146, with which the LECs are bound to comply. MCL 484.2318(2). The PSC, in its order of March 16, 2004, found that rates charged by SBC and Verizon to IPPs violated the NST. Any tariff approved prior to April 15, 1997, was preempted by the FCC's *Payphone Orders*. SBC and Verizon were not entitled to rely on any such tariff, and the existence of any such tariff did not preclude the PSC from ordering refunds. Under these circumstances, the PSC's conclusion that those rates did not fully comply with the NST and that the IPPs were entitled to refunds is reasonable and entitled to deference. *Public Service Comm No 2*, *supra* at 88.

The PSC is authorized to "order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result" of a violation of the MTA. MCL 484.2601. Specifically, MCL 484.2601(c) authorized the PSC to order that monies collected as a result of SBC and Verizon charging excessive rates to IPPs be refunded.

F. Reduction of IPP Charge for Intrastate EUCL Charge

SBC argues that the PSC exceeded its authority on remand by holding a further contested case hearing, and by determining that SBC was required to account for the intrastate EUCL in its NST analysis. We disagree.

Our Supreme Court remanded the case to the PSC for reconsideration in light of the *Wisconsin Order*. On remand, SBC argued that because the FCC had changed the NST, it should have the opportunity to present evidence based on that change. The PSC concluded that because the remedy sought by the MPTA, i.e., refunds, was significant, due process demanded that the parties have the fullest opportunity possible to present evidence, and on that basis reopened the record. Neither the FCC nor our Supreme Court precluded the PSC from reopening the record in order to fulfill the remand orders. Moreover, Rule 401 of the PSC's Rules of Practice and Procedure, AACS R 460.17401(1), allows the PSC to reopen proceedings to receive further evidence in order to develop a complete record or to consider changes of fact or law.

Furthermore, the PSC did not exceed its authority by requiring SBC to account for the intrastate EUCL charge in the formulation of its IPP rates. The EUCL charge duplicates certain elements of LECs' direct costs associated with providing access services to IPPs. SBC correctly notes that the FCC did not address the intrastate EUCL charge in the *Wisconsin Order*. However, in that order, the FCC made it clear that various non-cost based charges must be accounted for when determining whether an LEC's IPP rates comply with the NST, including the federally tariffed SLC. The FCC indicated that if such charges were not accounted for, LECs would make a double recovery of some costs, in contravention of federal law. *Wisconsin Order*, ¶ ¶ 12, 59-61. The PSC reasoned that because it was required by MCL 484.2318(2) to ensure that LECs complied with all nonstructural safeguards, it should require SBC to account for the EUCL charge to prevent double recovery of costs. The PSC's application of its authority under MCL 484.2318(2) is reasonable and entitled to deference. *Champion's Auto Ferry*, *supra*. The PSC did not exceed its authority on remand by addressing this issue. *In re Complaint of Pelland, supra*.

IV. Conclusion

The PSC's orders granting in part and dismissing in part the MPTA's complaint and denying rehearing are lawful and reasonable, and are supported by the requisite evidence.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio